

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9445 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

DEEPAK VYAS

Versus

STATE OF GUJARAT

Appearance:

MR K.G. VAKHARIA, SR. ADVOCATE WITH
MS AVANI S MEHTA for Petitioner
MR PG DESAI, GOVERNMENT PLEADER for Respondent No. 1, 2

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 30/12/1999

ORAL JUDGEMENT

#. The petitioner has approached this Court seeking
indulgence of the Court at a pre-detention stage
apprehending detention of his brother Prakash Vyas under
the provisions of Prevention of Black Marketing and

Maintenance of Supplies of Essential Commodities Act, 1980 ("PBM Act" for short).

#. The facts, in nutshell, leading to this petition are that, there is one Paras Service Station, being run at Makarpura, Vadodara, which is a partnership firm, of which there are three partners, (1) Mukesh Muljibhai Savla, (2) Anil Shantilal Chheda and (3) Prakash Vyas. There is one paid Manager, Mr. Rajesh T. Desai. The firm runs a petrol pump and deals in petrol, diesel, etc. since 1976. The petitioner is the brother of Prakash Vyas and seeks indulgence of this Court against an order of detention passed against Prakash Vyas under the provisions of PBM Act.

2.1 It may be noted that the order is not executed. The events leading to the alleged passing of the order are that authorities of the Civil Supplies Department (Enforcement), Gandhinagar, visited Paras Service Station on 7th August, 1999 and 24th August, 1999. During these two inspections, books of accounts, density of petrol, stock of petrol, etc. were checked and, according to the petitioner, everything was found to be in order and that there is an endorsement to that effect made by the authorities in the visit book. That officers from concerned department visited the petrol pump on 9th September, 1999 and underground tank and outlets of the pump were sealed and, therefore, the business, from that day, was prevented to be carried on. The petitioner came to know about the order which is allegedly passed on 30th October, 1999, when the police authorities of J.P. Nagar Police Station came to the house of the petitioner to detain his brother. It is contended that the order is passed without jurisdiction as the conditions precedent for passing the order were absent. It is also contended that the order suffers from the vice of mala fides and, therefore, this petition may be entertained, over at this stage, and the operation of the order in question may be suspended. It is contended in the grounds that the order is passed on basis of deficiency in percentage of octane in the motor spirit (petrol), which cannot be inspected at the petrol pump even while taking delivery.

#. The following reliefs are, therefore, sought by the petitioner in respect of his brother Prakash Vyas :-

"6. The petitioner, therefore, most humbly prays that :-

(a) a writ of mandamus or a writ in the nature of mandamus or any other

appropriate writ, order or direction may kindly be granted directing the respondents to produce before this Hon'ble Court the order of detention passed by the District Magistrate, Vadodara and approved by the State Government against the petitioner's brother Shri Prakash Vyas, partner of Paras Service Station, Makarpura, Vadodara;

(b) a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be granted quashing and setting aside the order of detention passed by the District Magistrate, Vadodara and approved by the State Government against the petitioner's brother Shri Prakash Vyas, partner of Paras Service Station, Makarpura, Vadodara and to direct the respondents, their agents and/or servants not to detain the petitioner's brother Shri Prakash Vyas under the provisions of the Prevention of Black Marketing Act;

(c) pending hearing and final disposal of this petition an interim injunction may kindly be granted restraining the respondents, their agents and/or servants from detaining the petitioner's brother Shri Prakash Vyas, partner of Paras Service Station, Makarpura, Vadodara, under the provisions of Prevention of Black Marketing Act;

(d) grant such other and further reliefs as the Hon'ble Court may deem fit in the facts and circumstances of the case."

#. Initially, the Court issued notice for admission as well as interim relief. Mr. P.G. Desai, learned Government Pleader has appeared on behalf of the respondents.

#. Mr. K.G. Vakharia, learned counsel appearing for the petitioner, submitted that he is conscious about the legal position that the Court can interfere at pre-detention stage in such preventive detention matters only in limited circumstances, as enumerated in the case of Additional Secretary to Government of India & Ors. v.

Smt. Alka Subhash Gadia and Another, 1992 Supp (1) SCC 496. According to him, the present case falls within two of those categories. In order to appreciate his arguments, he has given certain relevant dates:

7th August and 14th August, 1999 - Inspection by authorities.

9th September, 1999 - Petrol pump sealed.

18th September, 1999 - Relevant licence suspended for 60 days by the authorities.

30th October, 1999 - Order of detention was passed.

1st November, 1999 - Relevant licence was cancelled.

5.1 Mr. Vakharia submitted that, if the sequence and chronology of events are seen, it is evident that on the date of order, the licence, under which the firm was dealing in petrol, was suspended and the petrol pump was sealed and, therefore, as on the date of passing of the order, there was no possibility of the petitioner engaging in the activities which are alleged against him. In absence of licence, he could not have continued the business, more so when the petrol pump is sealed. The detention orders are passed as a preventive measure in order to prevent such activities. But by virtue of suspension of licence and sealing of pump, the activities were already stopped prevented and, therefore, the basic requirement or condition precedent for passing the order was absent when the order was passed. Mr. Vakharia submitted that, therefore, the case of the proposed detenu would fall within the first category stated in the Case of Alka Subhash Gadia (supra), i.e. "that the impugned order is not passed under the Act under which it is purported to have been passed".

5.2 Mr. Vakharia submitted that the test report of the petrol indicates that the octane in one of the tanks was as per the required standards, i.e. 87. He, however, fairly conceded that the report in respect of the sample taken from another tank does not conform to the standards. He placed reliance on the decision of the Apex Court in the case of Surinder Singh Ishwar Singh Guru Dutt v. Vipul Mitra & Ors., Writ Petition (Cri.) No.365/95, wherein, in similar situation where the density in one tank was found to be proper and in another to be not conforming to the standards, the Apex Court said on the plea of examination made by the investigation "Having regard to the report of Indian Oil Corporation

dated May 16, 1995, which shows that density of sample taken at outlet pump 2 was within permissible variation, it must be held that the satisfaction arrived at by the detaining authority for the purpose of passing the impugned order of detention is based on grounds which are non-existent. The order of detention of the detenu cannot, therefore, be sustained." Mr. Vakharia submitted that in this view of the matter, though octane test for the petrol of one of the tanks does not conform to the standards, the ground is non-existent as has been held by the Apex Court and, therefore also, the authority has no jurisdiction to pass this order.

5.3 As the second ground of attack, namely, mala fides, Mr. Vakharia submitted that the pump is being run by partnership firm and is being managed by a paid Manager. The authorities concerned have not taken any action against other partners or the Manager and, therefore, the action is mala fide against the petitioner. Mr. Vakharia submitted that the affidavit-in-reply filed by the authority does not deal with the allegation of mala fides and, therefore, the petition deserves to be entertained at this stage. Mr. Vakharia pointed out that the firm has preferred Special Civil Application No.7090 of 1999 against the sealing of the petrol pump, in which notice was issued and was made returnable on 2nd October, 1999. The authorities, in order to circumvent and dodge the order, that may be passed in that matter have used the provisions of the PBM Act by passing the present order. This is indicative of mala fides and, therefore, the petition may be entertained. He submitted that the case would fall in the third category stated by the Apex Court in the case of Alka Subhash Gadia (supra), namely, "that it is passed for wrong purpose". He submitted that the order is mala fide and the apparent purpose of preventing the petitioner from pursuing his activities detrimental to supplies of essential commodities like petrol is only a camouflage and, therefore also, the petition may be entertained. He submitted that with oblique motive, the order is passed and if the proposed detenu is to succumb to such orders, it would result into opening of flood gate for some such malicious orders.

#. Mr. P.G. Desai, learned Government Pleader, has opposed this petition. He submitted that the petitioner has approached the Court before execution of the order of detention and, therefore, he is not aware about the grounds for passing of order of detention and, therefore, at this stage, in absence of knowledge thereof, no allegations about mala fides can be made and, if they are

made, they are outcome of presumptions, assumptions and surmises. Mr. Desai submitted that, it would not be proper or correct to contend on part of the petitioner that sealing of pump and suspension of licence would make it impossible for the proposed detenu to continue his activities. He submitted that even surrender of licence would not vitiate the order of detention. He has placed reliance on the decision of this Court as reported in 1985(2) GLR 620 in the case between Parshottambhai Navalram Khemani v. State of Gujarat & Another. He submitted that, the Court, therefore, may not consider the first ground of detention advanced on behalf of the petitioner.

6.1 While dealing with the allegation of mala fides, he submitted that the dates which are given by the petitioner are not correct and, probably, are based on incorrect information. He has given the correct dates, which can be stated as under :-

9th September, 1999 - Sealing of petrol pump

18th September, 1999 - Suspension of licence.

23rd September, 1999 - Notice.

1st October, 1999 - Detention order.

1st November, 1999 - Cancellation of licence.

It was, therefore, submitted that the allegation that the impugned order was passed in order to circumvent the order that may be passed in Special Civil Application No.7090 of 1999, is not correct because, for the first time, in that matter, order was passed on 18th October, 1999 and, therefore, the order of detention was passed before any such order issuing notice was passed by the Court. The first ground of mala fide, therefore, does not survive.

6.2 As regards the second ground of mala fides, Mr. Desai submitted that the licence is in the name of the firm and the petitioner only is shown as a partner. He submitted that there is sufficient material on file for not immediately proceeding against the Manager or other partners and the proposed detenu cannot insist for action against other partners or Manager and it cannot be taken as a mala fide action.

6.3 Mr. Desai further submitted that the petitioner has approached this Court at a pre-detention stage. He

does not have any material before him to assail the order or to indicate any defects in the order. He submitted that it is a settled proposition of law that in such cases, in rare cases, petitions are to be entertained. Only if the case falls within the five categories stated in the case of Alka Subhash Gadia (supra) or situations of like species, the Court may interfere at pre-detention stage. This process of law may not be permitted to circumvent the provisions of preventive detention law or to put that law at naught. Mr. Desai submitted that, apart from Alka Subhash Gadia, there are numerous subsequent decisions which indicate again and again that the Court may not interfere at pre-detention stage. He, therefore, submitted that the petition may be dismissed.

#. After hearing the arguments advanced by Mr. Desai, Mr. Vakharia submitted that he does not press for the ground of mala fides on account of filing of Special Civil Application No.7090 of 1999 as, according to him, he had instructions that the order was passed on 30th October, 1999.

#. Before proceeding to consider the merits, it would be proper if the position of law, as it appears to have been settled up-till-now may be considered. In case of Vedprakash D. Chiripal v. State of Gujarat, reported in 1987(2) GLH 482, a Full Bench of this Court held that the Courts have powers to interfere at pre-execution stage in case of prevention detention orders, in cases where the detention order is found to be ex-facie illegal and arbitrary or ab-initio void. These powers are to be exercised in exceptional cases and in rarest of rare cases.

8.1 Then in case of Alka Subhash Gadia (supra), the Apex Court observed that, it is not that the Courts have no power to interfere at pre-execution stage in case of prevention detention, but it is held that the Courts have such power to entertain grievances against any detention order prior to its execution in proper cases, although such cases have been few and the grounds on which the Courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, namely, where the Courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed; (ii) that it is sought to be executed against a wrong person; (iii) that it is passed for a wrong purpose; (iv) that it is based on vague, extraneous and irrelevant grounds; or (v) that the authority which passed it had no authority to do so. The Court observed that refusal by Courts to use

their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question. In that very decision, in paragraph 32, it has been observed that the Courts have power to interfere with the detention orders even at pre-execution stage, but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases much less can a detenu claim such exercise of power as a matter of right. The discretion is of the Court and it is to be exercised judicially on well settled principles.

8.2 In *Subhash Muljimal Gandhi v. L. Himingliana & Another* (1994) 6 SCC 14, the Apex Court reiterated the same principles laid down in the case of *Alka Subhash Gadia* (supra), but observed that the interference with detention at pre-execution stage is limited to the five contingencies mentioned in *Alka Subhash Gadia's* case or other contingencies of the same species. The Court further observed that, at this stage, the Court cannot entertain disputed questions of fact. The principles in *Alka Subhash Gadia's* case were again reiterated in the case of *N.K. Bapna v. Union of India*, (1992) 3 SCC 512.

8.3 In case of *Administration of National Capital of Delhi v. Prem Singh*, 1995 Supp (4) SCC 252, it was held that interference at pre-detention stage is not permissible except on limited grounds enumerated in *Alka Subhash Gadia's* case. It was observed that no interference at pre-detention stage is permitted on any other grounds otherwise the very object of prevention detention is thwarted.

#. Now, therefore, the legal proposition that emerges from these decisions is, that the Court has jurisdiction to interfere with a detention order at a pre-execution stage, but the Court has to exercise these powers with a restraint, in exceptional and rarest of rare cases, if it is found that the case falls within any of the categories stated in case of *Alka Subhash Gadia* or a similar situation. The discretion is to be exercised judicially.

##. Factually, an attempt is made on behalf of the petitioner to indicate that the present case falls within category (i) and (iii) of the categories stated in the case of *Alka Subhash Gadia* (supra).

##. It may be stated at the outset that the petition is at a pre-execution stage the petitioner has no knowledge about the contents of the order of detention and the grounds of detention. The order is sought to be challenged in absence of any material particulars about the same and, therefore, at this stage, it would not be proper for this Court to proceed on a premise that the order is passed for the reasons that are alleged by the petitioner in view of a series of cautions given by the Apex Court for exercising the powers at a pre-detention stage.

11.1 As regards non-existence of the chances of continuing the activities because of suspension of licence and sealing of the petrol pump, it may be noted that a Division Bench of this Court had an opportunity of meeting with such an argument in the case of P.N. Khemani v. State of Gujarat & Another, 26(2) GLR 620. In paragraph 14, it is stated:

"Mr. Patel submitted that once licence of a dealer is cancelled or surrendered or can be surrendered or cancelled, the preventive detention of the petitioner cannot be ordered by the detaining authority as in such a case, cancellation would by itself be an effective remedy to keep the concerned detenu out of harm's way. Such a universal proposition cannot be accepted for the simple reason that if that is so, then in no case, where licenced fair price shop owner or dealer who is permitted to deal in essential commodity commits any misconduct armed with such a licence, such a person can ever be detained under section 3(1) of the Act as in every such case, licence can always be cancelled on the ground of such misconduct. This would amount to putting a total embargo on the power of the detaining authority to detain such dealers. Power of preventive detention would become totally non-existent in all such cases of misconducting licensed fair price shop owners. We do not find any such general exception supposedly made by the legislature while enacting section 3(1). To accept Mr. Patel's submission would amount to engrafting an exception of a proviso to section 3(1) of the Act to the effect that power of preventive detention would not be available in case of misconducting licensed fair price shop holders. Such an extreme contention put forward by Mr. Patel cannot be countenanced

as that would amount to an act of legislation on the part of the court."

Although that was a case of a fair price shop, the situation is similar to the present case, as in both - in a fair price shop as well as in a petrol pump - a licence is required for running the business. The Apex Court in the case of Madan Lal Anand v. Union of India & Ors., (1990) 1 SCC 81 did not accept a very similar argument. In that case, even though the term of licence had expired, the detention order was not quashed on the ground of no more chances of detenu's involvement in the activities.

11.2 With the above legal situation, this Court is not inclined to accept the argument of Mr. Vakharia that the case falls within the first category stated in Alka Subhash Gadia's case, on account of non-existence of condition precedent and want of jurisdiction therefor, viz. possibility of continuance of the activity sought to be prevented due to sealing of pump and suspension of the licence.

##. As regards the second contention regarding the octane test report and the judgment of the Apex Court relied upon by Mr. Vakharia, it would not be proper, in the view of this Court, to interfere with the impugned order by entertaining this petition, at this stage, when the Court does not have, before it, the grounds of detention. It would be hazardous to proceed on an assumption that the order is passed on a particular ground, viz. petrol not conforming to the octane test requirements and, therefore also, it cannot be said that the decision of Apex Court relied upon by Mr. Vakharia would be applicable to this case or that the case falls within the first category stated in the case of Alka Gadia (supra), as argued.

##. As regards the mala fides, it is argued that other partners and Manager of the firm are not detained. Again, a strait-jacket formula cannot be put that in case other partners are not acted against, the action against the proposed detenu is mala fide. There may not be grounds for proceeding against those partners/Manager or the action against them may be delayed and, therefore, only on this count, this Court is not inclined to accept the allegation about mala fides. It cannot, therefore, be said that the case falls under the third category stated in the case of Alka Subhash Gadia, namely, that the order is passed for a wrong purpose.

##. This Court, therefore, without making any observation on merits, is not inclined to entertain this petition at this pre-execution stage. The Apex Court has stated that, it would not be proper for the Court to do so except in exceptional cases and this case does not seem to be exceptional in any manner, for the reasons stated above. The powers are to be exercised in cases, where some legal or fundamental right of individual is seriously threatened and the facts of the case attract the contingencies enumerated in the case of Alka Gadia (supra). But, here, for the reasons stated above, the case does not seem to be falling in any of the categories stated in case of Alka Subhash Gadia or in any category that can be said to be akin to these categories. As stated by the Supreme Court, denial to exercise such powers in such cases, in fact, prevents the abuse and perversion of the law in question. The nature of the law which is preventive, would be frustrated if such powers are exercised by the Court at pre-execution stage.

##. This Court does not find any merit either in the allegations regarding the order having been passed in absence of condition precedent or the allegation of mala fides. The petition is not entertainable for the reasons stated in foregoing paragraphs and deserves dismissal. The petition is dismissed. Notice is discharged. No costs.

[A.L. DAVE, J.]

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